Supreme Court U.S.
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No. 02-593

IN THE

Supreme Court of the United States

Hall Holding Company, Inc., David L. Goldman, Kathleen A. Keating, George P. Ahearn, Michael F. Shields, Goldman Financial Group, Inc.,
Petitioners,

v.

Elaine Chao, Secretary, U.S. Department of Labor,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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Petitioners believe that this case presents an opportunity for the Court to address a core legal issue under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") – whether a plaintiff must prove causation in order to establish liability and/or to assess damages against a fiduciary who has allegedly breached his duties under ERISA. With all due respect to the Government, we do not believe that it has succeeded either in explaining why causation should not be an element of proof, nor in justifying why the Court should ignore the conflict between the Circuits created by the decision below. Accordingly, we see no reason to respond further on this point.

However, we do think it important to comment on the Government's response to our argument that the question presented directly affects the way courts will address the ever-increasing numbers of cases involving employee stock ownership plans ("ESOPs") because that response illustrates, and is bound to exacerbate, a fundamental problem with the decision below.

The courts have long held that, in order to establish liability or assess damages in an ESOP case, the plaintiff must prove that the defendant fiduciary caused a loss to the ESOP by paying more than a hypothetical reasonable fiduciary would have paid. Equally important was the notion that the task of the court was "not to redetermine the appropriate amount [of the fair market value] for itself *de novo*." *Donovan v. Cunningham*, 712 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251(1984).

At least that was the accepted standard -- the standard now is anyone's guess. For the Sixth Circuit squarely held that, since proof of causation is not a requirement, there is no reason to even consider what a hypothetical reasonable

fiduciary would have paid for the stock and the court may assess liability and damages if an ESOP fiduciary does not pay the exact price for closely-held ESOP stock that the district court has determined in a *de novo* valuation.

It is bad enough that a *de novo* valuation is precisely what a court should not do according to the Fifth Circuit in *Cunningham*, and that reading causation out of the statute by ignoring what a reasonable fiduciary would have done is directly contrary to the reasoning of the Eighth Circuit in *Herman v. Mercantile Bank, N.A.*, 143 F.3d 419 (8th Cir.), *reh'g en banc den.* 1988 U.S. App. LEXIS 20331 (1998). What is worse is that, in trying to explain away the Sixth Circuit's departures from accepted law, the Government has only succeeded in adding more confusion.

We read the Government's argument as follows. It begins by claiming that there is no difference between the valuation done by the district court and the amount a reasonable fiduciary would have paid. This is a bold attempt to resolve what it refers to as the "tension" between the Sixth and Eighth Circuits concerning the need to prove causation, but it lands them squarely at odds with the reasoning in *Cunningham* that, since valuation is an inexact science, there is no one number, including a court's *de novo* valuation, that represents what a reasonable fiduciary would have paid. Recognizing that problem, the Government switches gears and acknowledges that it has long held that, because there is a range of value in any valuation, fiduciaries must receive "some leeway in the area of ESOP valuations." Opp. 22. We have no quarrel with that proposition since it is consistent with the approach of the Eighth Circuit in *Mercantile Bank*, but we fail to see how the Government can espouse that position and still support the decisions below since there is no "valuation leeway" recognized in those decisions and indeed no attempt whatsoever to base liability

on any sort of range. The Government was no doubt thinking the same thing since it then added that, while fiduciaries are entitled to "some leeway," those who do not act in good faith are entitled to "less latitude."

We do not believe that the law is served by a "standard" that affords fiduciaries with no latitude, "some" latitude and "less" latitude – all at the same time. But that is the consequence of reading causation out of the statute in this important area of the law. We urge the Court to resolve the conflict created by the decision below and endorse the approach of the Eighth and Fifth Circuits that a plaintiff must prove that the price paid for ESOP stock was outside the range of value that a reasonable fiduciary would have paid in order to establish causation under ERISA.

Conclusion

We submit that it is important that the Court issue the writ of *certiorari* to resolve the split in the Circuits because this case involves an element of proof in every prohibited transaction case under ERISA. Moreover, the question is presented in a manner that is well suited to this Court's consideration since a resolution does not require reference to the facts of this case and there is no disagreement about what a causation standard involves. It is clear from the Government's brief that it agrees that causation requires a court to consider whether a defendant's actions caused loss by comparing the result of its actions to what a hypothetical reasonable fiduciary would have done. Finally, the fact that the issue arises in an ESOP case would provide additional benefit to the courts below. Once again, there is no disagreement about the content and practical effect of a causation standard in this context. If causation is required, the hypothetical reasonable fiduciary must be considered and that means using a range of value; if causation is not

required, the court will proceed to compare the price to its own *de novo* valuation.

In sum, this case presents an ideal set of circumstances for this Court to resolve a conflict in the Circuits concerning a core issue of ERISA jurisprudence.

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